

MONTGOMERY COUNTY ETHICS COMMISSION

ADVISORY OPINION

This opinion is issued in response to the request of a County employee for advice regarding her interest in competing for a contract with the County.

QUESTIONS PRESENTED

The request presents two questions:

1. May a County employee submit an offer in response to a Request for Proposals (RFP) issued by the County if the employee intends to retire from County service if he or she is awarded the contract?
2. May a former County employee who has retired from County service enter into a contract with the County to provide services to a County agency?

PERTINENT FACTS

Based on the request letter, the Commission understands the pertinent facts to be as follows:

1. In September of 2001, the County issued a Request for Proposals in which it solicited offers to provide certain bill-analysis services in connection with the annual regular session of the Maryland General Assembly.
2. A County employee who is eligible for retirement is interested in submitting a proposal if a similar RFP is issued this year.
3. The requester would retire from County service if awarded the contract, but would not retire prior to receiving an award.
4. The contract that would be awarded as a result of this competition would not be with or for the use of the County agency with whom the requester is affiliated; however, the knowledge gained by the requester in the performance of his or her duties with the County agency with which the requester is affiliated would constitute a significant part of the requester's qualifications for performing the contract.¹

PERTINENT LAW

On its face, the request potentially implicates four sections of the Ethics Law. §19A-12 concerning restrictions on other employment and business ownership; §19A-3 regarding the post-County employment of former public employees; §19A-14 concerning the misuse of a County employee's prestige of office; and §19A-15 regarding the disclosure of confidential County information. In pertinent part, these sections provide:

¹ Such contracts are entered into by the Director of Procurement for the use of a County agency other than the requester's agency.

§19A012.

- (b) Unless the Commission grants a waiver under subsection 19A-8(b), a public employee must not:
 - (1) . . . own more than one percent of, any business that:

* * *

 - (B) negotiates or contracts with the County agency with which the public employee is affiliated; or
 - (2) hold any employment relationship that would impair the impartiality and independence of judgment of the public employee.
- (c) Subsections (a) and (b) do not apply to:

* * *

 - (2) a public employee whose government duties are ministerial, if the employment does not create a conflict of interest . . .

§19A-13.

- (a) A former public employee must not accept employment or assist any party, other than a County agency, in a case, contract, or other specific matter for 10 years after the last date the employee significantly participated in the matter as a public employee.
- (b) For one year after the effective date of termination from County employment, a former public employee must not enter into any employment understanding or arrangement (express, implied, or tacit) with any person or business that contracts with a County agency if the public employee:
 - (1) significantly participated in regulating the person or business; or
 - (2) had official responsibility concerning a contract with the person or business (except a non-discretionary contract with a regulated public utility).
- (c) Significant participation means direct administrative or operating authority to approve, disapprove, or otherwise decide government action with respect to a specific matter, whether the authority is intermediate or final, exercisable alone or with others, and exercised personally or through subordinates. It ordinarily does not include program or legislative oversight, or budget preparation, review, or adoption.

§19A-14.

- (a) A public employee must not intentionally use the prestige of office for private gain or the gain of another. Performing usual and customary constituent services, without additional compensation, is not prohibited by this subsection.

* * *

- (c) A public employee must not use any County agency facility, property, or work time for personal use or for the use of another person, unless the use is:
 - (1) generally available to the public; or
 - (2) authorized by a County law, regulation, or administrative procedure.

§19A-15.

- (a) Except when authorized by law, a public employee or former public employee must not disclose confidential information relating to or maintained by a County agency that is not available to the public. A public employee or former public employee must not use confidential information for personal gain or the gain of another. Unless expressly prohibited by law, a public employee may disclose validly obtained confidential information to another public employee if the other public employee reasonably needs the information to carry out the employee's official duties.

ANALYSIS

The Ethics Commission has previously concluded that the Ethics Law does not prohibit a County employee from submitting a bid or offer in response to an RFP issued by the County—unless, of course, the employee has some responsibility for or participation in the preparation of the RFP, the evaluation of the bidders or offerors, or the selection of the winning bidder or offeror. *See Consent Order, Matter of Leonard Kligman*. Neither does the Ethics Law prohibit a County Employee from negotiating or contracting (in person or through a business entity owned in whole or in part by the employee) with a County agency with which the employee is not affiliated. Nevertheless, an employee may not hold any employment relationship that would impair the impartiality and independence of judgment of the public employee.

Under the facts presented, the requester, as a County employee, does not participate in the preparation of the RFP, the evaluation of offerors, the selection of the winning offeror, or the negotiation or administration of the contract. It is not a contract with or for the benefit of the agency with whom the requester is affiliated. Furthermore, the facts presented demonstrate no possibility that the requester will hold any employment relationship that would impair his or her impartiality and independence of judgment as a County employee. If the requester's offer is accepted, he or she will retire

from County employment. If the offer is not accepted, he or she will continue to have no responsibility for the contract with the successful offeror. Therefore, §19A-12 would not prohibit the requester from submitting an offer while a County employee or contracting with the County after retiring from County service.

The only post-County employment that the Ethics Law prohibits a former County employee from engaging in are those situations prescribed *[sic]* by §19A-13: (1) employment in a case, contract, or other specific matter in which the individual significantly participated while a County employee; and (2) employment with any person or business that contracts with a County agency if the public employee significantly participated in regulating the person or business or had official responsibility concerning a contract with the person or business. For these purposes, the term “significant participation” is narrowly defined to mean “direct administrative or operating authority to approve, disapprove, or otherwise decide government action with respect to a specific matter.” Neither of these situations is present here. Therefore, there are no post-County employment or business restrictions that would prevent a retired County employee from contracting with the County under the circumstances described in the request.

Nevertheless, a current County employee who is submitting an offer on a County contract, even one that will commence after retirement from County service, must be careful not to misuse the prestige of his or her current County position or divulge confidential information in competing for the award of that contract. For these purposes, a factually correct statement of one’s experience that does not reveal confidential information does not constitute the misuse of the prestige of one’s office. Neither may a County employee use any County agency facility, property, or work time for personal use unless the use is generally available to the public or authorized by County law, regulation, or administrative procedure.

Finally, if awarded a County contract, a former County employee must take care not to disclose confidential information except to a public employee who reasonably needs the information to carry out the public employee’s official duties.

CONCLUSION AND ADVICE

Applying the applicable law to the facts presented, the Commission advises:

1. A County employee who did not participate in the preparation of the RFP and will not participate in the evaluation of offerors, the selection of the winning offeror, or the negotiation or administration of the contract, may submit an offer in response to an RFP issued by or for the use of a County agency with which the employee is not affiliated.
2. A former County employee who has retired from County service and who did not participate in the matter as a County employee may enter into a contract with the County to provide services to a County agency with which the former employee was not affiliated.
3. As always, a current County employee must be careful not to misuse the prestige of his or her office, not to disclose confidential information, and not to use any County resource not available to the public or work time in the preparation of his or her offeror *[sic]*.

FOR THE COMMISSION:

[signed]

Elizabeth K. Kellar, Chair

September, 2002